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No. 00-0844

In the

Supreme Court of the United States

CHARLES GILBERT GIBBS, et al.,

Petitioners,

v.

BRUCE BABBITT, Secretary of the Interior, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL WILDERNESS INSTITUTE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Commerce Clause authorizes federal restrictions on the ability of individuals to defend themselves and their property from wild wolves, when such actions are wholly intrastate and noncommercial.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation and National Wilderness Institute respectfully submit this brief amicus curiae in support of the Petition for a Writ of Certiorari.[1] Written consent for amicus participation in this case was granted by counsel of record for all parties.

Amicus Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF has participated in numerous cases concerning the interpretation of the Commerce Clause and of the Endangered Species Act. PLF believes its public policy perspective and litigation experience will provide an additional viewpoint on the constitutional and legal issues presented.

Amicus National Wilderness Institute (NWI) is a nationwide nonprofit conservation organization with offices in Washington, D.C. NWI is dedicated to the wise management of natural resources. NWI believes conserving natural resources, including species, can be accomplished in conjunction with economic growth, and can best be achieved through private stewardship and private conservation efforts.

NWI has produced numerous publications on the failure of government-sponsored environmental regulatory schemes.

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae Pacific Legal Foundation and National Wilderness Institute affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

In particular, NWI has written extensively on the failure of the Endangered Species Act to meet its species recovery goals despite significant outlays of federal funds, and at the cost of imposing severe curtailments on the freedom of United States citizens to reasonably use private property.

BACKGROUND AND STATEMENT OF FACTS

In 1967, the United States Fish and Wildlife Service designated the red wolf an endangered species. *Gibbs v. Babbitt*, 31 F. Supp. 2d 531, 532 n.1 (E.D.N.C. 1998). After the passage of the Endangered Species Act in 1973, Fish and Wildlife engaged in a program to capture the last remaining red wolves then existing in the wild. *Id.* Since then, red wolves have been propagated exclusively through a captive breeding program. *Id.* In the 1980's, Fish and Wildlife began to seek opportunities to "reintroduce" the red wolf to its historic range. *Id.* Accordingly, in 1986, Fish and Wildlife established a reintroduction program to Alligator National Wildlife Refuge in North Carolina. *Id.* at 532. In 1993, Fish and Wildlife expanded the reintroduction area to include Pocosin Lakes National Wildlife Refuge. *Id.* at 533.

The red wolves in North Carolina are part of a "nonessential experimental" population. *See* 60 Fed. Reg. 18,939, 18,940 (Apr. 13, 1995); 16 U.S.C. § 1539(j). Nonessential experimental populations are generally treated as "threatened." *See* 16 U.S.C. § 1539(j)(2)(C). Under the Act, the regulation of "threatened" species is largely left to the discretion of Fish and Wildlife. *See* 16 U.S.C. § 1533(d).

As the population of red wolves grew, they increasingly wandered onto private land. *Gibbs*, 31 F. Supp. 2d at 533; *see also* 60 Fed. Reg. at 18,941. This situation generated a swell of public opposition. *Gibbs*, 31 F. Supp. 2d at 533. Fish and Wildlife acknowledges that wolves may kill domestic livestock and established "a $25,000 depredation account" to compensate ranchers in the event of loss. 60 Fed. Reg. at 18,942. Fish and

Wildlife also acknowledges that wolves present a threat to humans. It removed one red wolf from Alligator National Wildlife Refuge because it "repeatedly tolerated people at close distances." *Id.* And, in terminating its reintroduction program in Smoky Mountains National Park, it noted that a wolf that had begun to tolerate humans "represents a demonstrable but non-immediate threat to human safety . . . ." 63 Fed. Reg. 54,151, 54,152 (Oct. 8, 1998).

Yet despite the threat, Fish and Wildlife regulations have barred private property owners from "taking" a red wolf on their property except under specified circumstances. Petitioner Richard Lee Mann was prosecuted for violating Fish and Wildlife's regulation when he shot a red wolf that appeared to be threatening his cattle. *Gibbs v. Babbitt*, 214 F.3d 483, 489 (4th Cir. 2000). Partly due to this episode, North Carolina passed a law allowing a private landowner to "take" a red wolf where such a landowner "reasonably believes" that a red wolf may be a threat to his own life, the life of another, or to livestock. *Gibbs*, 31 F. Supp. 2d at 533. Fish and Wildlife's regulations state that a person may "take" a red wolf to defend his own life or the life of another, but a landowner may "take" a red wolf that attacks pets or livestock only where freshly killed or wounded animals are evident. *See id.* at 533 n.4.

Petitioners brought this case challenging the authority of the federal government to promulgate its regulation governing the "take" of red wolves on private property pursuant to its power "[t]o regulate commerce . . . among the several States." *Gibbs,* 31 F. Supp. 2d at 534. The district court upheld the regulation. *Id.* at 535. On appeal, in a 2-1 decision, the Fourth Circuit affirmed. *Gibbs v. Babbitt*, 214 F.3d at 489.

The Petition for a Writ of Certiorari asked this Court to grant the writ and hold the case for remand in light of the then-pending decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, which also

raised questions dealing with the federal commerce power. *See* Petition for a Writ of Certiorari (Petition) at 7. However, on January 9, 2001, this Court issued its decision in that case. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, No. 99-1178, 2001 U.S. LEXIS 640 (Jan. 9, 2001). That case did not resolve the question presented here because it was decided on statutory grounds. Accordingly, Amici urge this Court to grant the Petitioners' alternate request to grant the Writ of Certiorari to decide this case on the merits. *See* Petition at 30.

SUMMARY OF ARGUMENT

At issue in this case is a single regulation passed by Fish and Wildlife that prescribes the conditions under which private citizens within the State of North Carolina may shoot red wolves that come onto their private property. Under the regulation, Fish and Wildlife has made it a federal crime for any individual to shoot a red wolf on his property except under very specific conditions. One of the Plaintiffs here, Richard Mann, was prosecuted under this federal regulation, was fined, and was given the Orwellian sentence of building wolf houses and feeding wolves. *Gibbs*, 31 F. Supp. 2d at 533.

Notwithstanding this Court's pronouncements in *Lopez* and *Morrison* that, in order to meet the "substantial effects" test of constitutionality, a regulation must regulate an economic endeavor, the court below held that a federal regulation governing the killing of red wolves on private property constituted a valid exercise of the constitutional power "to regulate commerce . . . among the several states" not because the conduct itself was economic, but because it might have economic ramifications. This is a flawed interpretation and application of *Morrison* that threatens to eviscerate the "substantial effects" test completely, and this Court should grant the Petition to halt further distortions of this Court's precedents.

Though this Court has provided guidance to the lower courts on how to apply the "substantial effects" test, the court below gave undue deference to Congress and to Fish and Wildlife by sanctioning their pursuit of a socially favored policy. Despite this Court's admonitions in *Lopez* and *Morrison*, the lower court adopted a method of reasoning that entailed willingly fabricating links to interstate commerce that are highly speculative and highly attenuated in order to sustain a noncommercial federal goal. Unfortunately, this tendency to justify federal legislation by exalting narrow social policy goals over the broader interests of constitutional principles remains the norm in how the lower courts have treated Commerce Clause challenges to Endangered Species Act regulations.

Consequently, despite *Lopez* and *Morrison*, a comprehensive test for measuring the legitimacy of congressional enactments against the constitutional power remains elusive, and the lower courts are in need of further guidance. This Court should grant the Petition to clarify not only the scope of the federal power to regulate wildlife, but to refute the tendency of the lower courts to justify Commerce Clause legislation to serve expedient ends in direct contravention of the "substantial effects" standard.

ARGUMENT

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI BECAUSE THE LOWER COURT'S DECISION IN THIS CASE, AND SIMILAR DECISIONS OF OTHER LOWER COURTS, CANNOT BE RECONCILED WITH THIS COURT'S HOLDINGS IN *LOPEZ* OR *MORRISON*

In 1995, this Court decided the landmark case, *United States v. Lopez*, which held that the Gun Free School Zones Act was an invalid exercise of Congress' authority under Article I, Section 8, Clause 3 "[t]o regulate commerce . . . among the several states." Yet despite the watershed implications of that

decision, the lower federal courts continued to apply to federal legislation an expansive view of the federal commerce power. It was not until the Fourth Circuit ruled in *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820 (4th Cir. 1999), that any federal court of appeals adhered to the spirit and letter of *Lopez* by striking the federal Violence Against Women Act (VAWA) as beyond Congress' Commerce Clause authority. VAWA created a federal civil cause of action against any individual who perpetrated a "crime of violence" "motivated by gender." *United States v. Morrison*, 120 S. Ct. 1740, 1747 (2000).

Significantly, despite the logical conclusion that the regulation of crimes of violence is not a regulation of interstate commerce, the public and political reaction to the Fourth Circuit's decision was immediate and strong. Numerous organizations filed briefs asking this Court to review the decision, and, when this Court granted certiorari, 36 states and over 80 private organizations asked this Court for reversal. In particular, a significant number of women's organizations supported VAWA for obvious, and even sound, policy reasons. Nevertheless, this Court upheld the Fourth Circuit's decision by adhering to *legal* precepts rather than policy predilections. In short, unwilling to abandon the "first principle" that the Constitution created a federal government of limited and enumerated powers, *see United States v. Lopez*, 514 U.S. 549, 552 (1995), this Court refused to sanction a federal statute enacted under the commerce power where the statute's purported connections to interstate commerce were so clearly attenuated.

At issue here is a federal regulation which makes it a crime for an individual to kill, or "take," a red wolf, an animal listed as endangered under the Endangered Species Act. *See* 50 C.F.R. § 17.84(c) (2001). Like VAWA's civil cause of action provision, the Fish and Wildlife regulation enacts a broad prohibition on human conduct: an individual may not kill a red

wolf on his property unless human harm is imminent or death to animals is evident. In averring that the wolf regulation meets muster under the commerce power, the federal government and the court below necessarily take the position that, while violence against women may not be regulated by the federal government, violence against wolves may. In sum, the upholding of this regulation must be premised on the concept that a rancher or homeowner killing a red wolf on his own property has a greater effect on interstate commerce than committing violent crimes against humans. This is unsupportable.

The lower court's decision is irreconcilable with this Court's recent Commerce Clause jurisprudence. Specifically, in *Morrison*, this Court reiterated its holding in *Lopez* that, despite the breadth of the commerce power, "Congress' regulatory authority is not without effective bounds." *Morrison*, 120 S. Ct. at 1748. Adhering to the analysis announced in *Lopez*, this Court analyzed the challenged VAWA statute against several factors. First, this Court reiterated that commerce regulations must fall into one of three categories. *Id.* at 1749. First, Congress may regulate "channels of interstate commerce." *Id.* Second, Congress may regulate "instrumentalities of interstate commerce," or "things in interstate commerce." *Id.* And finally, Congress may regulate "those activities that substantially affect interstate commerce." *Id.* This Court found that the only possible category that could serve as the basis for the challenged VAWA provision was the last category, the "substantially affects" category. *Id.* Similarly, in this case, the court below found that "if [the wolf regulation] is within the commerce power, it must be sustained under the third prong of *Lopez*." *Gibbs*, 214 F.3d at 491.

Morrison spells out the requisite analysis for evaluating commerce legislation under *Lopez*' "substantially affects" test. First, this Court explained the importance of the nature of the

activity being regulated; that is, the activity had to be economic in nature:

> *Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, *the activity in question has been some sort of economic endeavor.*

Morrison, 120 S. Ct. at 1750 (emphasis added). Second, this Court looked at whether the statute has an express "jurisdictional element," by which the statute's application would be limited to those cases in which an interstate commerce effect was demonstrated. *Id.* at 1750-51. Third, the Court inquired as to whether Congress had made express findings as to the interstate commerce impacts of the regulated conduct. *Id.* at 1751. And finally, this Court independently analyzed the degree of attenuation between the regulated conduct and the purported effects on interstate commerce. *Id.* In this last factor, this Court reiterated its position that the "method of reasoning" used to justify a commerce regulation must not be so broad that it would "completely obliterate the Constitution's distinction between national and local authority." *Id.* at 1752. In short, this Court rejected any rationale which, if applied logically, would admit of no boundary to the federal commerce power.

Thus, the *Lopez/Morrison* "substantial effects" analysis is relatively straightforward: (1) is the nature of the conduct being regulated commercial or economic; (2) does the statute have an express jurisdictional element that limits its application to those circumstances in which there are interstate commerce impacts; (3) are there express congressional findings that the regulated conduct substantially affects interstate commerce; and (4) is the nexus between the regulated conduct and effects on commerce so attenuated that the rationale linking the two would justify a

limitless commerce power? As explained below, the conduct at issue in this case—killing a wolf on one's own property—is manifestly deficient in satisfying this test.

A. By Upholding the Red Wolf "Take" Regulation As Valid Under the Commerce Clause, the Court Below Established a Circuit Precedent Squarely at Odds with Recent Rulings of this Court

Addressing the four *Lopez/Morrison* factors in turn, it is clear that, like the gun possession statute in *Lopez*, the regulation governing the killing of wolves is "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561. Nonetheless, the court below forcibly shoehorned the wolf regulation into an "economic activity" by rationalizing that "economic activity must be understood in broad terms," citing *Wickard v. Filburn*, 317 U.S. 111 (1942). *Gibbs*, 214 F.3d at 491. Accordingly, the court asserted, with scant evidence, that "taking" wolves is an "economic activity" within the meaning of *Lopez* and *Morrison*:

> The protection of commercial and economic assets is a primary reason for taking the wolves. Farmers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops.

Id. at 492. In other words, the Court did not find that the regulated activity was commercial or economic; rather, it found that the individuals who engage in the conduct *may have* economic motivations and the conduct may have economic ramifications. But this is a boundless standard. The lower court's pronouncement of the facile truism that "with no red wolves, there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts," *id.*, is the same as saying that without food, there would be no food-related events, restaurants, or commerce, *and therefore* the federal government

may regulate how, when, where, whether, and what everybody may eat under its interstate commerce power. The fact that some object may in some circumstances be connected to interstate commerce is a meaningless test for determining what constitutes an "economic activity."

Even accepting the lower court's unsubstantiated assertion that economic motivation or result is the *sine qua non* of red wolf "takes" on private land, the concept that the economic motivation of an actor may convert regulated noncommercial activity into an "economic endeavor" is nowhere supported by *Lopez*, *Morrison*, or any other decision of this Court, and the lower court cites none. Virtually any activity might be shown to have economic ramifications: *"taking"* red wolves has economic ramifications, as does *not "taking"* red wolves, as does *moving* red wolves, as does *feeding* red wolves, as does *taking pictures* of red wolves. Accordingly, under the lower court's test, the government may demand any measure it wants, since any regulation dealing with red wolves is bound to have equally legitimate economic "connections" to red wolves.

Yet had this Court been willing to understand "economic activity" in such "broad terms," both *Lopez* and *Morrison* would present troublesome conundrums. Alphonso Lopez—whose possession of a firearm was for the purpose of ultimately selling the weapon—should have been unsuccessful in challenging the Gun Free School Zones Act. Further, crimes of violence that have an economic motivation—such as robbery—would have been sufficient to sustain VAWA in the face of a facial challenge. Yet this Court did not even discuss such scenarios as relevant to the "economic endeavor" inquiry. In short, there is no support in logic or case law for the proposition that an activity that by itself bears no economic or commercial character can be styled "economic conduct" simply by virtue of the fact that the act may have economic ramifications. *Morrison* baldly rejected the idea that the potential economic consequences of an act were sufficient to

transform noneconomic conduct into an economic activity within the meaning of *Lopez* when it rejected the notion that the economic impacts of violent crime on interstate travel, medical costs, and national productivity were sufficient to sustain VAWA. *Morrison*, 120 S. Ct. at 1753.

Similarly, the red wolf "take" regulation fails to satisfy the other factors of the *Lopez/Morrison* test. There is no jurisdictional element within the regulation. Further, there are no congressional findings to support the regulation, let alone the ESA, as a regulation directed at commerce, which the court below acknowledged: "there are no formal congressional findings that the ESA affects interstate commerce." *Gibbs*, 214 F.3d at 493 n.3. Not deterred, the court below, citing *Lopez* and *Morrison*, noted that such findings would be "neither necessary nor sufficient" to sustain federal regulations. *Gibbs*, 214 F.3d at 493 n.3. Therefore, the *lack* of findings left the court free to validate the statute by crafting its own ideas of how the regulation might affect interstate commerce, unshackled by congressional intent.

As a result, the court below makes a variety of findings supporting its conclusion that the red wolf regulation is "closely connected to a variety of interstate economic activities"—again, a meaningless standard that nowhere appears in this Court's jurisprudence. Specifically, the court found that the "take" "regulation is necessary to conserve enough red wolves to sustain tourism;" *id.* at 494; that "[t]he regulation of red wolf takings is also closely related to a second interstate market—scientific research" and that such research "generates jobs" and "may have inestimable future value, both for scientific knowledge as well as for commercial development of the red wolf;" *id.*, that the regulation is "connected to a third market—the possibility of a renewed trade in fur pelts;" *id.* at 495; and that the protection of red wolves is also "connected to interstate markets for agricultural products and livestock," *id.* In light of *Morrison*'s condemnation of "methods of reasoning"

which, when applied in a logical manner, would allow Congress to regulate anything at all, *Morrison*, 120 S. Ct. at 1752, this analysis is remarkable. Despite the court's assertion that "[t]he relationship between red wolf takings and interstate commerce is quite direct," it starts with a regulation that bans landowners from killing wolves on their own land, and, through extrapolating all the possible ramifications of such an action, concludes that the regulation is in reality a regulation of interstate commerce in tourism, scientific research, fur pelts, and agricultural commodities.

Further, according to the court below, the regulation need not even have an effect on this commerce to be valid:

> The full payoff of conservation in the form of tourism, research, and trade may not be foreseeable. Yet it is reasonable for Congress to decide that conservation of species will one day produce a substantial commercial benefit to this country and that failure to preserve a species will result in permanent, though unascertainable, commercial loss.

Gibbs, 214 F.3d at 496. Thus, this post-*Morrison* analysis holds that any future potential to engage in commerce related to the regulated activity is sufficient to sustain federal authority.

In *Morrison*, the government cited congressional findings that violence against women affected interstate commerce

> "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products."

Morrison, 120 S. Ct. at 1752 (citation omitted). This Court found that these effects were too far removed from the actual

regulated conduct (violence against women) to sustain VAWA. Nonetheless, the court below had little difficulty in approving a rationale that was expressly rejected by this Court in *Morrison*. It is difficult to comprehend how Congress *may not* regulate violent conduct that inhibits the victim from engaging in interstate commerce, but *may* regulate violent conduct that inhibits *others* from engaging in activities *that have the potential to affect* interstate commerce.

The lower court's extended discussion never adequately confronts the fourth *Morrison* factor—whether the rationale is so broad that it sanctions an unlimited federal authority. Instead, it skirts this troublesome factor by concluding that, whatever its rationales may justify, there is no constitutional problem because the Endangered Species Act does not *in fact* attempt to regulate all conduct:

> But these concerns are simply not implicated by [the regulation]. Rather, the ESA and this regulation in particular permit the exercise of federal power only to conserve those species that are "endangered" or "threatened." . . . The rationale for upholding [it] is restricted to the special relationship between endangered species and interstate commerce . . . . It is not a connection that can be drawn outside of the endangered species context to support federal regulation of just any local or intrastate object with a medical, scientific, or economic value.

Gibbs, 214 F.3d at 503-04. In other words, the court excused the fact that its own rationales were boundless, because it asserts that it would *not* have applied the same broad rationales had Congress attempted to regulate everything. But this is analytically incorrect. As this Court explained in *Morrison*, Congress may not regulate a subset of conduct without the authority to regulate the conduct in the first place:

> If Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Morrison, 120 S. Ct. at 1753. The lower court failed to explain how its *reasoning* provided any limiting principle. Indeed, the rationales relied upon by the court below would sanction federal regulation of the treatment of any animal, such as a common house cat, since cats, cat toys, cat food, cat shows, etc., have a tremendous effect on interstate commerce—likely more than the commerce related to all endangered and threatened species, let alone the red wolf. Thus, the lower court's assurances that its rationale is sound rings hollow.

The *Gibbs* decision has essentially relegated this Court's recent precedent in *Morrison* as a case to be treated not as a pronouncement of constitutional principle, but an aberration limited to its own facts. Accordingly, this Court should act swiftly to prevent a further erosion of its pronouncements on the constitutional principle of enumerated powers.

B. Federal Courts Have Been Incapable of Providing Coherent, Cohesive, or Consistent Theories for Upholding the Federal Regulation of Wildlife on Interstate Commerce Grounds, Demonstrating the Need for a Definitive Ruling by this Court

As troubling as the lower court's decision is, it is not the only indicator of the treatment *Lopez* and *Morrison* have received at the hands of the lower federal courts. Limiting this discussion to the sole issue of how the Commerce Clause has been treated with respect to the regulation of wildlife, it is clear that the lower courts have tortured and contorted the Commerce Clause to reach the desired result of upholding the ESA's "take" regulations. While this characterization would appear to

be overly critical, the sheer number and variety of routes which federal judges have traveled to arrive at the improbable conclusion that regulating the "take" of a fly, wolf, bird, or fish is in actuality regulation of interstate commerce is ample evidence of the dubiousness of these commerce rationales. Indeed, the questionable worth of these rationales has prompted Fish and Wildlife to assert alternative sources of federal authority for its regulations, including the Treaty Power (*see Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985, 993 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981); *Shields v. Babbitt*, No. MO-99-CA-040, slip op. at 33 (W.D. Tex. July 12, 2000), *appeal pending*, No. 00-50839; and the Property Clause—even where species do not exist solely on federal property, *see* 65 Fed. Reg. 17,779, 17,781 (Apr. 5, 2000).

The commerce rationales employed by the lower courts to sustain the breathtaking sweep of the Endangered Species Act's "take" regulations are so broad that they violate the fourth *Lopez/Morrison* factor in that, if validated, they would sanction a limitless federal power to regulate anyone and anything. Accordingly, these decisions are not only incorrect as a matter of law, but they have created precedents that necessarily undermine this Court's attempts to establish constitutional norms in *Lopez* and *Morrison*.

The first case to confront a Commerce Clause challenge to regulation under the Endangered Species Act was *Palila*. *Palila*, 471 F. Supp. at 993. The challenge was not to the "take" provision specifically, but to the regulation of Palila birds by the federal government in general, and was couched as a Tenth Amendment challenge. *Id.* As the case was decided prior to this Court's decision in *Lopez*, the lower court's treatment of the Commerce Clause issue is understandably cursory, simply asserting, without further analysis, that

> a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species, that would otherwise be lost by state inaction.

Id. at 995.

The district court's decision in *Palila* was the only case dealing with this issue for over a decade. Subsequent to *Lopez*, however, the Commerce Clause argument was revived in a case challenging federal regulation of the habitat of the Delhi Sands Flower-loving fly. *National Association of Home Builders v. Babbitt*, 949 F. Supp. 1 (D.D.C. 1996), *aff'd*, 130 F.3d 1041 (D.C. Cir. 1997) (*NAHB*). Notably, the district court found that the regulation of the fly was valid under the second and third *Lopez* categories. That is, the fly is a "thing in interstate commerce" because it had been exhibited in three museums outside of its native California and specimens had once been shipped to insect collectors. *NAHB*, 949 F. Supp. at 8. Further, citing *Wickard* and *Palila*, the district court concluded taking flies substantially affected interstate commerce:

> The aggregate impact upon interstate commerce of trade in wildlife is substantial and as such, it may be regulated by Congress. . . . The "taking" of individual species located entirely within one state, would clearly, in the aggregate, have a significant effect upon interstate commerce.

NAHB, 949 F. Supp. at 8 (citations and footnotes omitted).

The court of appeals affirmed in a split decision. Two of the judges upheld the lower court's result, but *neither* upheld the lower court on the same rationale, and a third judge would

have held the regulation invalid. Indeed, the judges did not even agree as to what *Lopez category* the regulation fit into. Judge Wald held the regulation valid under the first and third *Lopez* categories (that is, regulating the channels of interstate commerce and activities that substantially affect interstate commerce), *NAHB*, 130 F.3d at 1046, and Judge Henderson found that only the third *Lopez* category applied, *NAHB*, 130 F.3d at 1057-58. Significantly, *none* of the appeals judges affirmed the lower court's reliance upon the second *Lopez* category (whether the fly was a "thing in interstate commerce"). And even more, though both Judges Wald and Henderson agreed that regulation of the fly substantially affected interstate commerce, they could not agree as to how this was so. Judge Wald relied upon the sorts of broad rationales favored by the *Gibbs* majority, claiming, for example:

> Each time a species becomes extinct, the pool of wild species diminishes. This, in turn, has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes.

NAHB, 130 F.3d at 1053. Judge Henderson, on the other hand, flatly rejected the notion that there is potential future commercial use of the species, concluding that it was just as likely that none of the species protected "now or in the future will have any of the economic value proposed." *Id.* at 1058 (Henderson, J., concurring). She, instead, concluded that

> [g]iven the interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of [the fly] will therefore substantially affect land and objects that are involved in interstate commerce.

Id. at 1059 (Henderson, J., concurring). Judge Sentelle, of course, rejected these and every other rationale. *See id.* at 1060 (Sentelle, J., dissenting).

The decision in *Gibbs* below was also not without conflict. The district court decision, like the district court in *NAHB*, upheld the red wolf regulation under the second and third *Lopez* categories. *Gibbs*, 31 F. Supp. 2d at 535. Astonishingly, the court found that the wolves were things in interstate commerce because some red wolves "either have crossed state lines or may cross state lines in the future"—though why the self-generated movement of wolves across state lines amounted to "commerce" was never explained. Rather, the court simply held that actions by wolves and tourists have "economic consequences, as tourists, academics, and scientists follow the red wolves." *Id.*

With the embellishments noted in Section A above, the Fourth Circuit, in a 2-1 decision, upheld the lower court. But even there, the Fourth Circuit did not entertain for a moment the lower court's assertion that wolves themselves were "things in interstate commerce," *Gibbs*, 214 F.3d. at 491, and Judge Luttig, like Judge Sentelle in the D.C. Circuit, found that the red wolf regulations did not meet this Court's substantial effects test at all, *Gibbs*, 214 F.3d at 506 (Luttig, J., dissenting).

Other federal courts have also addressed the validity of the "take" regulations under the Commerce Clause. *Shields v. Babbitt*; *Building Industry Association of Superior California v. Babbitt*, 979 F. Supp. 893 (D.D.C. 1997) (*BIA*). Adding to the peculiar mix of opinions, the district court, in *Shields*, upheld the take regulation as applied to six animal and plant species by finding that the regulation fit into the first and third *Lopez* categories. *Shields*, slip op. at 22. In so doing, the court simply adopted Judge Wald's single and singular opinion that regulating the "take" of species is a regulation of the channels of interstate commerce, *id.* at 23-24, and, in finding that the

regulation was valid under the "substantially affects" test, trotted out the unsubstantiated findings that have thus far survived challenge—that is, finding that "taking" a member of a listed species might result in the extinction of species with some as-yet-indeterminate potential future commercial use or value, or that it will inhibit interstate travel by tourists and scientists seeking to observe these species, or that the regulation itself will have impacts on other economic activities. *Id.* at 28-31. And in *BIA*, the court simply cited to the *NAHB* and *Palila* decisions, holding "[f]or the same reasons, the application of the ESA to the fairy shrimp is within Congress's commerce clause power." *BIA*, 979 F. Supp. at 907.

Finally, Fish and Wildlife itself creatively found another way to plot a route to interstate commerce:

> Moreover, a substantial amount of interstate commerce arises from the efforts of conservation organizations to protect rare species. The Nature Conservancy, a national organization that engages in substantial interstate commerce through fund-raising and sale of its publications, has sought to protect *Plagiobothrys hirtus* [a plant] through voluntary agreements and land acquisitions.

65 Fed. Reg. 3866, 3869 (Jan. 25, 2000).

As this summary points out, the lower courts and individual federal judges (and even the Fish and Wildlife Service itself) have widely varying views not only of the *Lopez* categories and the *Lopez/Morrison* substantial effects test and how they should be applied, but they also have widely varying views of just how it is that the Endangered Species Act "take" regulation does or ought to relate to interstate commerce. And though the fact that the tourism/scientific research rationale keeps appearing in these cases might lead one to conclude that the interstate commerce effects of species regulation is manifest, not even the courts that rely upon these rationales

have felt sufficiently confident of the strength or validity of these arguments in post-*Lopez/Morrison* jurisprudence that they could simply cite them and close the matter. Rather, these courts have repeatedly embarked on an analysis that entails a lengthy litany of foggy justifications for why the federal government ought to regulate plants and animals under its commerce power.

This inability to agree on a common rationale demonstrates the precariousness of the commerce argument in the first instance, and further illustrates the morass in which the lower courts find themselves. Thus, this case presents an opportunity for this Court not only to address the significant public policy implications of the narrower question presented, but to resolve the continued confusion displayed by the lower courts on how to apply the *Lopez/Morrison* test of constitutionality.

CONCLUSION

For the reasons stated above, Amici respectfully request that this court GRANT the Petitioners' Petition for a Writ of Certiorari.

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Respectfully submitted,

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